2019 IL App (4th) 180531-U

NO. 4-18-0531

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 1, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
EARNEST MAURICE BELL,	)	No. 14CF732
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded with directions for the trial court to appoint defendant new counsel and then allow appointed counsel the opportunity to investigate defendant's claim of ineffective assistance of counsel and take whatever action appointed counsel deems appropriate thereafter.

¶ 2 Following a September 2015 bench trial, defendant, Earnest Maurice Bell, was convicted of two counts of unlawful delivery of a controlled substance within 1000 feet of a church, two counts of unlawful delivery of a controlled substance, one count of possession of a controlled substance with the intent to deliver within 1000 feet of a church, and one count of unlawful possession of a controlled substance with the intent to deliver and sentenced to three concurrent terms of 22 years' imprisonment. In October 2015, defendant filed a *pro se* motion alleging, in part, he was provided ineffective assistance by his trial counsel. At a December 2015

hearing, the trial court did not inquire into defendant's complaint about his counsel's performance.

¶ 3 Defendant appealed, arguing this court should (1) remand the matter because the trial court failed to conduct an inquiry into a *pro se* posttrial claim of ineffective assistance of counsel; (2) remand for a new trial and fitness hearing because the court failed to *sua sponte* order, and/or his trial counsel provided ineffective assistance by failing to request, a fitness evaluation when a *bona fide* doubt existed as to his fitness at the time of trial; (3) remand for a new trial because his right to due process and his right to confront witnesses were violated when his trial was held without him; (4) reverse his convictions for possession with intent to deliver because the State failed to prove beyond a reasonable doubt he had either actual or constructive possession of the discovered drugs; and (5) reduce his sentence or remand for a new sentencing hearing because his sentence is excessive in light of his mental illness and history of drug addiction. In March 2018, we agreed with defendant's first argument and remanded the matter for the trial court to conduct an inquiry into defendant's *pro se* posttrial claim of ineffective assistance of counsel in accordance with *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny. *People v. Bell*, 2018 IL App (4th) 151016, ¶ 3. We declined to reach defendant's other claims, noting the result from the proceedings on remand could render those claims moot. *Id.* ¶ 37.

¶ 4 In July 2018, the trial court held a hearing pursuant to this court's remand. Following that hearing, the court ruled defendant failed to show he received ineffective assistance from his trial counsel.

¶ 5 Defendant appeals, arguing this court should (1) remand for a new trial as the record establishes the trial court erred in finding at the *Krankel* hearing his trial counsel was not ineffective for failing to request a fitness hearing, (2) remand for a new trial and fitness hearing

because the court failed to *sua sponte* order a fitness evaluation when a *bona fide* doubt existed as to his fitness at the time of trial, (3) remand for a new trial because his right to due process and his right to confront witnesses were violated when his trial was held without him, (4) reduce his sentence or remand for a new sentencing hearing because his sentence is excessive in light of his mental illness and history of drug addiction, and (5) reverse his convictions for possession with intent to deliver because the State failed to prove beyond a reasonable doubt he had either actual or constructive possession of the discovered drugs.

¶ 6 We reverse the trial court's judgment following our prior remand and remand the matter with directions for the trial court to appoint defendant new counsel and then allow appointed counsel the opportunity to investigate defendant's claim of ineffective assistance of counsel and take whatever action appointed counsel deems appropriate thereafter. We again decline to reach defendant's other claims. We retain jurisdiction.

¶ 7 I. BACKGROUND

¶ 8 A. Indictment

¶ 9 In June 2014, the State charged defendant by indictment with unlawful delivery of a controlled substance within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2012)) (count I), unlawful delivery of a controlled substance (*id.* § 401(d)) (count II), unlawful delivery of a controlled substance within 1000 feet of a church (*id.* § 407(b)(1)) (count III), unlawful delivery of a controlled substance (*id.* § 401(c)(2)) (count IV), unlawful delivery of a controlled substance within 1000 feet of a church (*id.* § 407(b)(1)) (count V), unlawful delivery of a controlled substance (*id.* § 401(c)(2)) (count VI), unlawful possession of a controlled substance with the intent to deliver within 1000 feet of a church (*id.* § 407(b)(1)) (count VII), and unlawful possession

of a controlled substance with the intent to deliver (*id.* § 401(c)(2)) (count VIII). The State later nol-prossed counts I and II.

¶ 10 B. Bench Trial

¶ 11 On September 11, 2015, the trial court, Judge Robert L. Freitag presiding, held a scheduled bench trial. Prior to commencing the trial, the court held a discussion on the record with defense counsel and the prosecuting attorney. Defendant was not present but rather remained in a holding cell. Defense counsel indicated defendant was "agitated," "very upset," and "expressed that he was going to hurt himself" because counsel was unwilling to present a defense that counsel found to have no basis in law. The court elicited comment from the supervising sergeant of court security, who explained defendant was "hitting the walls," "kicking the door," "demanding to go downstairs back to the jail," and "saying he's not coming into the courtroom." The court indicated it would recess to allow defense counsel to speak with defendant about his right to be present during trial.

¶ 12 After speaking with defendant, defense counsel returned to the courtroom, and the trial court continued a discussion on the record. Defendant remained in a holding cell. Defense counsel indicated he explained to defendant his right to be present at trial, to which defendant "repeatedly said he didn't understand and he intended to harm himself." Defense counsel noted defendant's agitation began that morning after counsel refused defendant's request to present a "police misconduct defense." The prosecutor noted defendant had not acted out in court previously, which included a period of time when defendant proceeded *pro se*, and had no jail disciplinary reports. Defense counsel further noted defendant had "always been civil up until this morning." The supervising sergeant noted he witnessed defendant with defense counsel and saw

defendant knot a shirt around his own neck and attempt to flush the shirt in a toilet. The supervising sergeant further noted defendant's demeanor was "fine" up until the point he went into the interview room with defense counsel that morning. The court found it would be appropriate for it to take additional measures to explain to defendant, on the record, his right to be present at trial.

¶ 13 The trial court convened a hearing outside the holding cell with defense counsel, the prosecuting attorney, defendant, a court reporter, and court security. The court explained to defendant why he was going to trial and his right to be present, to which defendant maintained he did not understand. Defendant asserted "[t]he police department is trying to set me up" and "trying to kill me." Defendant repeatedly stated he did not understand why he was being charged and why he was going to trial. Defendant then sat on the floor in the back of the holding cell and refused to answer the court's question about waiving his right to be present at trial. The court found defendant had been fully admonished regarding his right to be present during his trial and his inappropriate behavior constituted a waiver of that right.

¶ 14 Back in the courtroom, the trial court continued the discussion on the record. The court, *sua sponte*, raised the issue of defendant's fitness. The court noted it had "numerous occasions" to interact with defendant during the case. The court found it did not have a *bona fide* doubt as to defendant's fitness. It believed "defendant is simply being uncooperative, and for whatever reason[,] he has chosen to do so." After finding so, the court allowed defense counsel and the prosecutor the opportunity to address whether they believed a *bona fide* doubt existed as to defendant's fitness for trial. Defense counsel noted he and defendant had communicated "very well" and defendant became agitated only after their disagreement that morning. Defense counsel believed defendant was "fit to stand trial," and he "detected nothing to indicate" defendant did not

understand the questions posed from counsel or the court. The prosecutor also noted defendant had been "polite and respectful" when receiving discovery while previously *pro se*.

¶ 15 The trial court conducted defendant's bench trial in his absence. After the State presented its case in chief, the court requested defense counsel to again speak with defendant about being present and testifying. Defense counsel discussed the matter with the supervising sergeant, who discussed the matter with defendant and then related to defense counsel that defendant continued to refuse to appear in court. The defense rested without presenting any evidence.

¶ 16 Following closing arguments, the trial court found defendant guilty of counts III through VIII. The court ordered the preparation of a presentence investigation report (PSI) and set a sentencing hearing for October 28, 2015.

¶ 17 C. PSI

¶ 18 On September 18, 2015, a PSI was filed with the trial court. The PSI noted, at the time of its preparation, defendant was "on suicide precautions" and "his meal and medication refusals are being documented." The PSI further noted defendant declined to cooperate or participate in its creation.

¶ 19 The PSI provided a detailed history of defendant's mental-health issues. In part, the PSI provided the following. On September 29, 2009, a McLean County judge found defendant unfit for sentencing purposes in McLean County case No. 08-CF-84. Following that finding, defendant was transferred to the Department of Human Services to be restored to fitness. On February 5, 2010, the judge found defendant's fitness for sentencing had been restored. On February 11, 2010, defendant was seen by "Dr. Paturi" in the county jail. Dr. Paturi discontinued certain medications previously prescribed to defendant but continued to prescribe "Abilify" and

"Venlafaxine," which the PSI noted were "psychotropic medications." On February 22, 2010, defendant was sentenced to 10 years' imprisonment in case No. 08-CF-84. The PSI does not provide any information concerning defendant's prescribed medications or behavior while imprisoned. In June 2014, defendant was arrested and incarcerated on charges in this case. Shortly after his incarceration, defendant, "[a]ccording to Inmate Assessment Specialist Melinda Fellner,"

> "spoke with medical and indicated he had been prescribed medication at the facility he was at previously. He indicated wanting to be back on medication and was instructed to request to see the counselor so the process could begin. [Defendant] did not follow through until July of 2015, and he had remained stable in the pod. The jail psychiatrist prescribed an anti-depressant[,] which [defendant] began taking in August 2015. [Defendant] last took his medication the morning of September 11, 2015, prior to his trial in this cause."

¶ 20 D. September 18, 2015, Docket Entry

¶ 21 A September 18, 2015, docket entry indicates the prosecuting attorney and defense counsel appeared before the trial court. The prosecutor orally moved to reset the sentencing hearing. The court scheduled a hearing to address the motion. We note the record does not contain a transcript from the September 18, 2015, appearance.

¶ 22 E. Hearing on the State's Motion to Reset the Sentencing Hearing

¶ 23 On September 23, 2015, the trial court held a hearing on the State's motion to reset the sentencing hearing. Defendant did not appear. Defense counsel informed the court defendant

was not present because he "did not wish to come to court." The prosecutor agreed with defense counsel's representation, noting defendant indicated he would not be leaving his cell. The prosecutor also informed the court of the fact the PSI had been completed without defendant's cooperation or involvement. Over no objection, the court reset the sentencing hearing for September 28, 2015.

¶ 24 Prior to concluding the hearing, the following discussion occurred:

> "[DEFENSE COUNSEL]: The only think I would add for the record, I have been checking on [defendant's] well-being through Melinda Fellner through the jail. I've talked to her several times since I've learned of this hunger strike that he's now engage in, and I will continue to do that. I don't have any concerns about—based on my extensive conversations with him, about his fitness to be sentenced. And if I did have such a concern, I would address it, but I don't.
>
> THE COURT: All right. Thank you for that addition ***, and, of course, the [c]ourt would be very sensitive to anyone's suspicion that there was some *bona fide* doubt as to his fitness, and, obviously, would expect counsel to raise that if, in fact, it becomes apparent to one of you[.]"

¶ 25 F. Sentencing

¶ 26 On September 28, 2015, the trial court held a sentencing hearing. Defendant appeared in custody with defense counsel. Defense counsel noted he and defendant "spoke briefly,

but [defendant] was nonverbal." Defense counsel stated he did not go over the PSI with defendant "verbatim." The court inquired into whether defendant would like time to personally review the PSI, to which defendant stated, "No." During recommendations, defense counsel noted, in part, the PSI discussed "in great detail the psychiatric problems that [defendant] has dealt with over his lifetime." Following recommendations, the court allowed defendant the opportunity to make a statement in allocution, to which defendant stated, "No thank you, [y]our [h]onor." The court merged count IV into count III, count VI into count V, and count VIII into count VII. It then sentenced defendant to three concurrent terms of 22 years' imprisonment. In reaching its decision, the court noted, in part, the following:

> "I think there is [mitigating evidence], and certainly that's appropriate for the court to consider. Primarily that consists of your mental health history, and I think that that goes a long way towards helping to kind of shape and explain some of your behavior both by committing this offense, as well as since being in custody here; the court is cognizant of those things, and I think it's certainly appropriate to consider those things in imposing a sentence here today."

After rendering its sentencing decision, the trial court admonished defendant as to his appellate rights. The court questioned defendant whether he had any questions about his rights, to which defendant stated, "No."

¶ 27 G. Motion to Reconsider Sentence

¶ 28 On September 30, 2015, defendant, through counsel, filed a motion to reconsider

his sentence, which asserted the sentence imposed was excessive.

¶ 29 H. *Pro Se* Motion

¶ 30 On October 1, 2015, defendant filed a *pro se* motion, titled "MOTION OF LEAVE APPEAL." In his motion, defendant alleged, in part, as follows:

> "THE DEFENDANT WAS DENIED CONSTITUTION RIGHT 6TH AMENDMENT RIGHT TO PUBLIC FAIR TRAIL. EFFECTIVE ASSISTANCE OF COUNSEL ATTORNEY."

Defendant requested the trial court grant his motion and "RETRACT GUILTY VERDICT."

¶ 31 I. Hearing on Defendant's Motion to Reconsider

¶ 32 In December 2015, the trial court held a hearing on defendant's motion to reconsider. In support of his claim suggesting the sentence imposed was excessive, defense counsel highlighted defendant's mental-health issues: "I think it's very clear from [defendant's] conduct and the information contained in the [PSI] that he is and was suffering from serious mental illness, has been diagnosed in the past with clinical depression and has, on several occasions in the past, voiced a desire to harm himself and made some attempts to harm himself." After considering the arguments presented, the court denied defendant's motion. In doing so, the court noted it "did consider [defendant's] mental health history and situation as *** significant mitigation." The court did not conduct an inquiry into defendant's *pro se* complaint about his counsel's performance. Defendant appealed.

¶ 33 J. Appeal

¶ 34 In March 2018, we agreed with defendant's argument on appeal suggesting we should remand the matter because the trial court failed to conduct an inquiry into his *pro se*

posttrial claim of ineffective assistance of counsel. *Bell*, 2018 IL App (4th) 151016, ¶¶ 2-3.

¶ 35 K. *Krankel* Hearing

¶ 36 In July 2018, the trial court, Judge John C. Costigan presiding, held a hearing pursuant to this court's remand. Judge Costigan initially noted he had taken over the case due to Judge Freitag's retirement. Defendant, defendant's trial counsel, and the prosecuting attorney appeared. The prosecutor did not, however, participate in the hearing.

¶ 37 The trial court first allowed defendant to elaborate on his complaint about his trial counsel's performance. Defendant alleged his trial counsel's performance was constitutionally deficient where he failed to (1) investigate alibi evidence, (2) request a fitness evaluation and hearing, (3) confront the State's witnesses at trial, (4) present available evidence at trial, and (5) present mitigating evidence at sentencing. The court inquired into the factual bases of each of defendant's complaints. With respect to his complaint about his counsel's failure to request a fitness evaluation and hearing, defendant stated he (1) had "been suffering from mental illness for years," (2) "wasn't on medication at the time," (3) "was trying to get medication from the jail, but they refused to give it to me," (4) attempted suicide on the day of trial, and (5) was found unfit by Judge Freitag in a prior criminal case. Defendant further stated, "I believe that at the time of trial I wasn't in the right state of mind *** [a]nd *** if I could have been properly medicated *** like I am now, like to calm down or something like that, that would have given me the chance to at least try to help myself in some type of way."

¶ 38 After inquiring into the factual bases of defendant's complaints, the trial court allowed defendant's trial counsel the opportunity to respond. Counsel responded to each of defendant's complaints. With respect to defendant's suggestion he should have requested a fitness

evaluation and hearing, counsel disagreed maintaining at no point did he have a *bona fide* doubt concerning defendant's fitness. Counsel highlighted he was appointed approximately three months prior to defendant's bench trial and had met with defendant on June 16, 2015, for about an hour to discuss the evidence and possible defenses and then again on August 10, 2015, for about an hour and a half to prepare for trial. Counsel asserted defendant had no difficulty communicating during their meetings. Counsel acknowledged defendant refused to come out of his cell on the day of trial, asserted he did not understand what was going on, and threatened to harm himself. Counsel maintained this behavior, however, did not raise a *bona fide* doubt of defendant's fitness. With respect to defendant's medication, counsel stated:

> "[Defendant just] mentioned that he wasn't taking medication. Well, that's something that he never shared with me, never told me that he was being denied prescribed medications. And if he had, that might have influenced my actions. I think it probably would have. I would have, at the very *** least, communicated with the jail to see if he had been examined by a doctor down there and if there was a reason why he wasn't being given medication that he felt he needed. But he didn't tell me about that."

¶ 39 The trial court allowed defendant the opportunity to respond to his trial counsel's comments. Defendant stated, in part, the following:

> "The day of the trial, the real reason that made me flip out or lo[]se it or why I really thought that I might as well—don't take it the wrong way, but I feel as though I might be better off dead

> because I was in the east pod. I was taken out of the east pod. I was taken to the 6th floor here in the jail, and I was threatened by three deputies. I was told not to communicate with the Judge. I was told not to write anymore letters, basically not to represent myself.
>
> I remember the Officer CJ who escorted me there. And I told [trial counsel], every time you leave the pod, you are signed out. I wrote a grievance. He never got that information which would have proved that I was taken from the jail—out of my cell to upstairs on the 6th floor in family courtroom and threatened by the officers. That's why I picked him up as my attorney on the next court date because I was threatened after defending myself as *pro se*. He refused to have the information brought to the court.
>
> When he said that he don't recall the day of trial—on the day of trial he told me that I didn't have any defense."

¶ 40 After hearing from defendant and defendant's trial counsel, the trial court took the matter under advisement.

¶ 41 L. Written Order Disposing of Defendant's Claims

¶ 42 On July 31, 2018, the trial court entered a written order addressing each of defendant's complaints about his trial counsel's performance. The court concluded defendant failed to establish his counsel provided ineffective assistance.

¶ 43 This appeal followed.

¶ 44 II. ANALYSIS

¶ 45 On appeal, defendant argues this court should (1) remand for a new trial as the record establishes the trial court erred in finding at the *Krankel* hearing his trial counsel was not ineffective for failing to request a fitness hearing, (2) remand for a new trial and fitness hearing because the court failed to *sua sponte* order a fitness evaluation when a *bona fide* doubt existed as to his fitness at the time of trial, (3) remand for a new trial because his right to due process and his right to confront witnesses were violated when his trial was held without him, (4) reduce his sentence or remand for a new sentencing hearing because his sentence is excessive in light of his mental illness and history of drug addiction, and (5) reverse his convictions for possession with intent to deliver because the State failed to prove beyond a reasonable doubt he had either actual or constructive possession of the discovered drugs. The State contends all of defendant's arguments are meritless and we should affirm the trial court's judgment.

¶ 46 Following the filing of the State's brief on appeal but before defendant had the opportunity to file a reply brief, the State filed with this court a motion to cite *People v. Roddis*, 2018 IL App (4th) 170605, which we granted. In its motion, the State highlighted the holding in *Roddis* that "a trial court commits reversible error when it conducts a *Krankel* hearing and concludes—on the merits—that there was no ineffective assistance ***." *Id.* ¶ 81. The State asserted this holding was "relevant" to resolving defendant's initial argument in this appeal.

¶ 47 Thereafter, defendant filed a reply brief, which, in part, addressed the State's citation to *Roddis*. In his brief, defendant did not dispute under *Roddis* he would be entitled to a remand for further proceedings on his claim of ineffective assistance as the record shows the trial court improperly ruled on the merits of his claim of ineffective assistance. Instead, defendant requested we disregard the trial court's determination and address anew whether his trial counsel

provided ineffective assistance by failing to request a fitness hearing based on the record presented. Specifically, defendant argued another remand would be "unnecessary" as "all of the facts necessary to resolve [his] claim are fully developed by the trial record and the record from the *Krankel* remand."

¶ 48 Contrary to defendant's argument, we find the record is not fully developed. At the hearing on remand, defendant alleged his counsel provided ineffective assistance by failing to request a fitness hearing, in part, because he was not on his medication and, had he been properly medicated as he had been at the remand hearing, he would have been able to assist in his defense. In response, defendant's trial counsel asserted he was not made aware defendant was not being given his medication and, had he been aware of this information, he would have reached out to jail staff to see if defendant had been examined by a doctor and why he was not being given the medication that he felt he needed.

¶ 49 The PSI, which defendant's trial counsel reviewed, demonstrates defendant had been prescribed two "psychotropic medications," "Abilify" and "Venlafaxine," while in the McLean County jail in 2010. The record does not provide any information as to whether defendant's prescription changed after he was imprisoned. Shortly after his release from prison, defendant was arrested and incarcerated in this case and then requested he be prescribed the medication from the "facility" he was at previously. Sometime in August 2015, defendant was prescribed an "anti-depressant," which he continued to take through the day of his trial. Defendant made clear he believed the medication, or absence thereof, had some impact on his fitness on the day of trial.

¶ 50 A defendant is presumed to be fit to stand trial and be sentenced and is only unfit

"if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2014). A fitness hearing is required only upon a *bona fide* doubt of a defendant's fitness. 725 ILCS 5/104-11(a) (West 2014). "A number of factors may be considered in assessing whether a *bona fide* doubt of fitness is raised, including a defendant's irrational behavior, demeanor at trial, any prior medical opinion on the defendant's competence, and any representations by defense counsel on the defendant's competence ***." *People v. Brown*, 236 Ill. 2d 175, 186-87, 923 N.E.2d 748, 755 (2010). However, no fixed or immutable sign "invariably indicates the need for further inquiry on a defendant's fitness." *Id.* at 187. Instead, "the question is often a difficult one implicating a wide range of manifestations and subtle nuances." *Id.*

¶ 51 The record shows both the trial judge and defendant's trial counsel were aware of defendant's erratic behavior on the day of trial and his history of mental-health issues yet concluded that behavior and mental-health history did not raise a *bona fide* doubt of defendant's fitness at trial or sentencing. The record does not show, however, how defendant's medication or absence thereof may have impacted his fitness. It is not clear as to what "anti-depressant" defendant was actually prescribed, when defendant began taking the medication, what impact that medication may have had on defendant's fitness, and why previously prescribed medication was not provided. The answers to these questions, which may be discovered with minimal effort, may garnish additional support for defendant's claim of ineffective assistance. See *People v. Weeks*, 393 Ill. App. 3d 1004, 1011, 914 N.E.2d 1175, 1182 (2009) ("[A] defendant is only entitled to relief if he shows the trial court would have had a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now referenced.").

¶ 52 After careful review, we find the appropriate relief is to reverse the trial court's judgment following our prior remand and remand the matter with directions for the trial court to appoint defendant new counsel and then allow appointed counsel the opportunity to investigate defendant's claim of ineffective assistance of counsel and take whatever action appointed counsel deems appropriate thereafter. As a result, we again decline to reach the merits of defendant's other claims. To avoid any future confusion or uncertainty, we make explicitly clear we are, as we implicitly did before, remanding while retaining jurisdiction. In the event defendant is not satisfied with the outcome of the proceedings on remand, he may again appeal and raise any supplementary claims relating to the remand proceedings, and the State may have an opportunity to respond to those claims.

¶ 53 III. CONCLUSION

¶ 54 We reverse and remand with directions for the trial court to appoint defendant new counsel and then allow appointed counsel the opportunity to investigate defendant's claim of ineffective assistance of counsel and take whatever action appointed counsel deems appropriate thereafter.

¶ 55 Reversed and remanded with directions.